

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DARLENE P. NIESWENDER,

Plaintiff,

Case No: 1:08-cv-294

v

HON. JANET T. NEFF

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

OPINION AND ORDER

Plaintiff seeks judicial review of a decision of the Commissioner of the Social Security Administration. 42 U.S.C. § 405(g). The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (R & R), recommending that this Court affirm the Commissioner's decision finding that Plaintiff was not entitled to disability insurance benefits (DIB). The matter is presently before the Court on Plaintiff's objections to the Report and Recommendation. In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order.

Plaintiff objects that the Magistrate Judge erred in failing to credit the Sworn Statement of Robert Shurmur, D.O., plaintiff's rheumatologist, who stated that plaintiff "would be unlikely to maintain gainful employment." Plaintiff challenges this determination on several grounds. This Court finds the allegations of error without merit.

Plaintiff first argues that the Magistrate Judge erred in supporting the finding of the Administrative Law Judge (ALJ) that the Sworn Statement was entitled to little weight because the

issue of disability is reserved for the Commissioner and because the ALJ found that the restrictions were unsupported by the record as a whole. Plaintiff asserts that the ALJ dismissed Dr. Shurmur's statement in one sentence, which falls far short of "giving good reasons" for not according weight to the opinion of her treating physician under *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541 (6th Cir. 2004). Plaintiff argues that this is particularly so since she suffers from fibromyalgia, a difficult impairment to diagnose, and one which may be supported by fewer objective medical findings in order to credit a treating physician's opinion.

Plaintiff's argument is without merit. The Magistrate Judge reviewed the ALJ's consideration of Dr. Shurmur's opinion in light of the applicable standards and authority (R & R, 7-10). The Magistrate Judge properly found that the treating physician rule was not violated, the ALJ's decision was supported by more than substantial evidence, and that the ALJ complied with the procedural requirement of providing "good reasons" for the weight accorded to Dr. Shurmur's opinion (*id.* at 10). This Court is unpersuaded that a diagnosis of fibromyalgia alters the review under the circumstances of this case.

Plaintiff argues that the general failure to credit Dr. Shurmur's opinion also warrants a finding of error by the Magistrate Judge in (1) rejecting Dr. Shurmur's testimony that plaintiff could not work on a reliable basis, and thus could not perform sedentary work; and (2) accepting that the ALJ relied on accurate hypothetical questions when he reviewed the vocational expert's testimony. This Court finds no error on either ground. The Magistrate Judge properly considered these specific allegations of error under the social security regulations and other applicable authority, and found them without merit (R & R, 7-8, 12-13).

Plaintiff also argues that the Magistrate Judge erred in failing to acknowledge evidence probative of plaintiff's credibility, such as plaintiff's work record, and her multiple and extraordinary attempts to return to work, and instead the ALJ relied on his own observation that plaintiff did not appear to be in pain during her hearing. *See Schaal v. Apfel*, 134 F.3d 496, 502 (2d Cir. 1998) (cited by plaintiff as authority that a good work history strengthens the plaintiff's credibility).¹ Contrary to plaintiff's argument, the ALJ and the Magistrate Judge did not improperly base their determinations on the ALJ's observations of plaintiff and other "flimsy reeds" in the face of probative evidence of credibility (Obj. at 3). Plaintiff's arguments are without merit.

Accordingly:

IT IS HEREBY ORDERED that Plaintiff's objections (Dkt 18) are DENIED, the Report and Recommendation of the Magistrate Judge (Dkt 17) is APPROVED and ADOPTED as the Opinion of the Court, and the decision of the Commissioner of Social Security is AFFIRMED.

A Judgment will be entered consistent with this Opinion and Order.

Dated: April21, 2010

/s/ Janet T. Neff

JANET T. NEFF

United States District Judge

¹Plaintiff takes issue with the Magistrate Judge's response to her citation to *Schaal*, which noted that plaintiff cited no similar authority from the Sixth Circuit Court of Appeals. Plaintiff's point lacks merit. *Schaal* itself relies on this same principle in response to the plaintiff's citation to case authority from the Seventh Circuit. *Schaal*, 134 F.3d at 503.